DOCUMENT RESUME

ED 312 270 TM 013 850

AUTHOR Ware, Leland
TITLE The Discriminatory Implications of Teacher Competency Testing.
PUB DATE 89
NOTE 27p.; Based on a paper presented at the Annual Meeting of the Association of American Law Schools (New Orleans, LA, January 5-8, 1989).
PUB TYPE Speeches/Conference Papers (150) -- Reports - Research/Technical (143)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Civil Rights Legislation; *Court Litigation; Elementary Secondary Education; Equal Opportunities (Jobs); *Minimum Competency Testing; Multiple Choice Tests; Occupational Tests; Performance Tests; *Public School Teachers; Racial Discrimination; *Standardized Tests; *Teacher Certification; Teacher Evaluation; Teacher Rights; *Test Bias; Test Construction; Test Validity
IDENTIFIERS Civil Rights Act 1964 Title VI; Civil Rights Act 1964 Title VII; Educational Testing Service; National Teacher Examinations; Pre Professional Skills Tests; *Teacher Competency Testing

ABSTRACT

Legal issues associated with competency testing of teachers are reviewed, with an emphasis on the problem of bias against minority examinees taking standardized tests. The central legislative foci of legal activity in this area are Titles VI and VII of the Civil Rights Act of 1964. Title VII requires employers to show, with validation studies, that occupational tests are predictive of the work behavior of the job for which the examinee is being considered. Title VI requires defendants to demonstrate a statistically significant correlation between the test and the examinees' success in a job training program. Cases reviewed include "Griggs v. Duke Power Co." (1971), "Ablemarle Paper Co. v. Moody" (1975), "Washington v. Davis" (1976), "United States v. State of South Carolina" (1977), "Debra P. v. Turlington" (1979), "United States v. "LULAC" (1986), and "Anderson v. City of Bessemer" (1985). Use of the National Teacher Examinations (NTE) and the Pre Professional Skills Test and the involvement of the Educational Testing Service (ETS) in test construction and validation efforts are outlined in the context of the case reviews. A new multiple-choice examination--to be developed by ETS to supersede the NTE--which concentrates on successful classroom performance, does not purport to be useful as the sole criterion for teacher certification. (TJH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED312270

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
LELAND WARE
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

THE DISCRIMINATORY IMPLICATIONS OF TEACHER COMPETENCY TESTING[1]

Introduction

During the past few years, the concern about the quality of instruction provided to students in the nation's public schools has escalated. A report commissioned by the Department of Education which was highly critical of the American educational system concluded that the nation is "at risk" from "a rising tide of mediocrity".[2] Other studies have been less alarming,[3] but there is a growing consensus of opinion that the nation's educational system has declined significantly. Instead of developing a thoughtful and measured response to this complex and politically-charged problem, several states have responded to the demand for classroom competency with the expedient of standardized testing for teachers.[4]

---

1 Leland Ware, Assistant Professor, St. Louis University School of Law. B.A. Fisk University 1970; J.D. Boston College Law School 1973. This article is based on a presentation that the author made to the Education Law Section of the American Association of Law Schools 1989 Annual Meeting.

2 National Commission on Excellence in Education, A Nation At Risk: The Imperative of Educational Reform (1983).

3 See e.g. E. Boyer, High-School: A Report On Secondary Education In America. (1983).

4 Several states require standardized competency testing of prospective teachers under state statutes giving school boards broad powers. See e.g., ALA CODE § 16-3-16 (1988); CAL. EDUC. CODE § 44252 (West 1978 § Supp. 1989); GA. CODE § 20-2-282 (1981 § Supp. 1987); IND. CODE ANN. § 20-6.1-3-10 (West 1985); KAN. STAT. ANN. §20-6.1-3-10 (West 1985); KAN. STAT. ANN. §80-120 (1980 § Supp. 1985); CAL. EDUC. CODE § 44252 (West 1978 § Supp. 1989); GA. CODE § 20-2-282 (1981 § Supp. 1987); IND. CODE ANN. § 20-6.1-3-10 (West 1985); KAN. STAT. ANN. §1338 (Supp. 1986); MISS. CODE ANN. § 37-9-11

TM013850

BEST COPY AVAILABLE

This approach makes passing scores on standardized tests a prerequisite to employment in the case of new teachers and a condition of retention for teachers who are already employed. These requirements have been subjected to a number of legal challenges on a variety of grounds.[5] In most instances, however, the courts have sustained the validity of competency examinations.[6] Although few would object to the states' reasons for enacting competency requirements, the efforts that are being made to improve the quality of instruction should not impair the legal rights of the individuals who are affected.

(1972); N.C. GEN. STAT. § 115C-296 (1987); S.C. CODE ANN. § 59-25-110 (Law Co-op. 1976); TEX. EDUC. CODE ANN. §13-032 (e) (Vernon 1972 § Supp. 1989); W. VA. CODE § 18-2-6 (1984). Testing of currently certified teachers is less common. See, e.g., ARK. STAT. ANN. § 80-1267.1 (Supp. 1985); TEX. EDUC. CODE § 13.032 (e) (Vernon 1972 § Supp. 1989).

5 Because standardized tests usually have a disparate impact on minority applicants and teachers, these tests have been challenged under Title VII of the Civil Rights Act of 1964. See, e.g., United States v. South Carolina, 445 F. Supp. 1094, 1110-1116 (D.S.C. 1977) (using a rational basis scrutiny, the court found the use of NTE scores for certification survived the Title VII business necessity test). These tests have also been challenged on Due Process grounds. See, Note, Teacher Termination and Competency Testing, 63 TEX. L. REV. 933, 953-957 (1985) (discussing basis for challenges under procedural and substantive due process). Others have claimed the tests impair the contract between the teachers and the state thus violating the contracts clause of the Constitution. See, e.g., Texas State Teachers Ass'n v. Texas, 711 S.W. 2d. 421 (Tex. Ct. App. 1986). Equal Protection challenges have also been attempted. See, e.g., United States v. LULAC, 793 F. 2d. 636 (5th Cir. 1986); Debra P. v. Turlington, 644 F. 2d. 397, 406 (5th Cir. 1981); United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977).

6 See, e.g., Allen v. Alabama State Board of Education, 816 F. 2d 575 (11th Cir. 1987); Moore v. Tanjipahon Parish School District, 594 F. 2d. 489 (5th Cir. 1979).

It has been repeatedly shown that standardized tests have had a disproportionate impact on minority teachers and students.[7] When there is a disparate impact of this sort, Title VII of the Civil Rights Act of 1964[8] requires employers to show, with validation studies, that the test is predictive of, or significantly correlated to important elements of the work behavior of the job for which the candidate is being considered. In the case of training programs, Title VI of the Civil Rights Act[9] requires defendants to demonstrate that there is a statistically significant correlation between the test and the candidates' success in the program. Despite the relative success of the defendants in teacher competency litigation, the standardized tests which have been used to measure competency do not satisfy these "job-relatedness" standards.

Thus far, the cases have focused on due process questions, breach of contract claims, and determinations of whether the plaintiffs could prove discriminatory intent.[10] These questions appear to have diverted the courts attention from the important statutory issues. If potential plaintiffs narrow their focus to claims alleging violations of Titles VI and VII, proof of discriminatory intent would not be necessary.

---

7 See, note, Teacher Competency Testing, 63 TEX. L. REV. 933, 949 (1985).

8 42 U.S.C. §§ 2000e to 2000e-17 (1982).

9 42 U.S.C. §§ 2000d et. seq. (1982).

10 See note, Teacher Competency Testing, 63 TEX. L. REV. 933, 949 (1985).

Furthermore, since the validation studies of current examinations do not comply with the EEOC's Guidelines, the defendants would not be able to satisfy their burden of establishing job-relatedness. For these reasons, if future actions allege violations of Titles VI and VII, the plaintiffs would probably prevail.

The Development Of The Disparate Impact Analysis

In Griggs v. Duke Power Co,[11] the Supreme Court held that standardized tests could not be a pre-condition to employment when they are not significantly related to job performance and Black applicants are disproportionately disqualified. In Griggs, the evidence showed that the company had openly discriminated against Black employees prior to 1965 by restricting them to a specific department.[12] After 1965, the race criterion was abandoned but a high school diploma and a passing score on a standardized test became prerequisites to the higher paying jobs.[13] A civil action was filed alleging violations of Title VII and, at the conclusion of a trial, the district court held that the company was not liable because it had abandoned its discriminatory policies on or before the effective date of Title VII.[14] The Court of Appeals affirmed after

---

11 401 U.S. 424 (1971).

12 Id. at 427.

13 Id. at 428.

14 Id.

it concluded that there was no discriminatory intent involved in the company's use of the tests.[15]

When the case was reviewed by the Supreme Court, it held that employment practices which are facially neutral cannot be maintained if they are "fair in form but discriminatory in operation".[16] Consequently, the Court held that if an employment practice operates to exclude minorities and is not job-related, it violates Title VII and the plaintiff is not required to prove discriminatory intent.[17] To support its decision that the tests were not job-related, the Court relied on evidence which indicated that employees who had not taken the tests or completed high school continued to perform well and receive promotions.[18]

In the Court's view, a showing of motivation is not required because the statute is intended to eliminate "the consequences of employment practices not simply the motivation". Although the statute specifically allows employers to use standardized tests, they must be shown to be job-related if they exclude a disproportionate number of minority applicants.[19] If an employer shows that tests are job-related, the

---

15 Id. at 429.

16 Id. at 431. The Court found that Congress' intent in passing Title VII was to require "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." Id.

17 Id. at 432.

18 Id. at 431-32.

19 Id. at 436.

plaintiff can still prevail if he can show that there are other devices which would achieve the employer's objective without a disparate impact on minorities.[20]

In another case involving standardized examinations, Albermarle Paper Co. v. Moody,[21] the Court explained the defendant's evidentiary burden after its tests have been shown to have a disparate impact on minorities. In Albermarle, the company required, as a condition of employment, a high school diploma and a satisfactory score on two separate standardized examinations.[22] Four months after the case went to trial, the company hired an industrial psychologist who prepared a study which established a statistically significant correlation between the employer's tests and job performance at the supervisory level.[23] Based on this evidence, the trial court held that the post-employment examinations were job-related but it disallowed the high school diploma requirement since it believed the tests alone were an adequate measure of the ability to perform the jobs in question.[24] The court also concluded that one of the tests was unlawful because it had not been validated.

---

20 422 U.S. 405 (1975).

21 Id. at 410 (applicants were given the Revised Beta Examination to measure non-verbal intelligence and the Wonderlic Personnel Test to measure verbal skills. Id. at 410-11).

22 Id. at 411.

23 Id.

24 Id.

When the case reached the Supreme Court, it held that "discriminatory tests are impermissible unless shown, by acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which the candidates are being evaluated.'"[25] Relying on the EEOC's Guidelines,[26] the Supreme Court held that the validation study used in this case was deficient for several reasons. The Court found that the study failed to validate all of the skilled lines of job-progression; it showed significant correlations in only three of the eight lines of progression; the two examinations were allegedly interchangeable but the Court found that there were significant correlations to some lines of progression while there were no correlations to other lines of progression.[27] The study compared test scores with subjective rankings prepared by supervisors, but the Court was unable to determine the nature of criteria utilized for the rankings.[28] The study compared job groupings near the top of the various lines of progression to lower level jobs and the study compared experienced workers with applicants who were younger and less experienced.[29] Based on these findings, the Court held

---

25 Id. at 431 (quoting EEOC Guidelines at 29 CFR § 1607.4 (c)).

26 29 CFR § 1607.

27 Abemarle Paper Co. v. Moody, 422 U.S. at 431-32.

28 Id. at 433.

29 Id. at 433-34.

that the validation study did not establish that the standardized examinations were job related.[30]

In another case, Washington v. Davis,[31] the Court considered a constitutional challenge to the validity of a qualifying examination administered to applicants for the District of Columbia police force. In this case, applicants were required to score at least forty out of eighty on "Test 21", an examination that was used generally in the federal civil service. Test 21 was designed to test verbal ability, vocabulary, reading and comprehension. Evidence presented during the trial indicated that a disproportionate number of black applicants failed the examination.[32]

The district court held that the standardized test was valid under Title VII standards based on its conclusion that the test was "directly related to a determination of whether the applicant possesses sufficient skills requisite to the demands a recruit must master at the police academy."[33] The Court of Appeals reversed because the defendant had not shown a direct relationship between the examination and the performance of a policeman's job.[34] The Supreme Court reversed after it concluded

---

30 Id. at 436.

31 426 U.S. 229 (1976).

32 Id. at 233-35.

33 Davis v. Washington, 348 F. Supp. 15, 17 (D.D.C. 1972).

34 Washington v. Davis, 426 U.S. at 249-50.

that the disparate impact analysis does not apply to constitutional claims.[35] The Court held that unlike Title VII claims, proof of discriminatory intent is needed when constitutional challenges are asserted.[36] (This case did not include any Title VII claims.) Nevertheless, it reinstated the district court's approach to the job-relatedness standard stating "that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer."[37]

The Court of Appeals' interpretation was supported by the EEOC's Guidelines,[38] which require the validity of a job qualifications test to be established by empirical data which demonstrates that the test is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which the candidates are being developed."[39] Despite the standards set forth in

---

35 Id. at 247-48 (court declined "to adopt this more rigorous standard for purposes of applying the Fifth and the Fourteeth Amendments..." Id.).

36 Id. at 239 (Supreme Court "cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional soley because it has a racially disproportionate impact" Id.).

37 Id. at 250.

38 29 CFR § 1607. 4 (C).

39 Id.

the Guidelines and the holding in Griggs, which require employees to prove that the challenged practice "bear a demonstrable relationship to successful performance of the jobs for which it is used,"[40] Davis suggests that tests which are used to screen applicants for training programs need only be related to success in the training course. As the following discussion will demonstrate, however, in the leading cases concerning teacher competency examinations, the courts failed to apply either standard.

United States v. South Carolina

In United States v. State of South Carolina,[41] a three-judge panel approved South Carolina's use of the National Teacher Examination ("NTE") as a selection device. The plaintiff brought an action against the State, the State Board of Education, the State Retirement System and three school boards alleging violations of the 14th Amendment, 42 U.S.C. §§ 1981 and 1983 and Title VII of the Civil Rights Act of 1964, based on the defendants' use of the National Teacher's Examination to certify teachers for employment and to determine the levels of pay for teachers after they were hired.[42]

---

40 401 U.S. at 431.

41 445 F. Supp 1094 (1977) aff'd, 434 U.S. 1026 (1978).

42 Id. at 1097.

The South Carolina statute required persons who taught in public schools to hold a certificate issued by the State Board of Education.[43] The State established a four-tiered system which was based on NTE scores.[44] The system was implemented in the mid - 1940's after a decision issued by the Court of Appeals for the Fourth Circuit held that the State of Virginia could not maintain a system which compensated Black teachers less than similarly situated white teachers.[45] Before it implemented the system, South Carolina tested 50% of its teachers. The results showed that 90% of the white teachers but only 27% of the Black teachers would qualify for the A or B certificates (the two top grades). Of the remaining candidates, 10% of the whites and 73% of the blacks would receive the lower C and D certificates. The State decided to adopt the pay system notwithstanding this disparity.[46] In 1956, the School Board adopted an absolute score system under which applicants who scored less than 332 did not receive licenses. (They would previously have received grade D certificates under the State's four-tiered system.)[47]

From 1957 to 1969, the State received data from the Educational Testing Service ("ETS") concerning the disparate impact of the NTE on

---

43 S.C. CODE ANN. § 59-25-140 (Law Corop. 1976).

44 445 F. Supp. at 1101.

45 Alston v. School Board, 112 F. 2d. 992 (4th Cir.) cert. denied, 311 U.S. 693 (1940).

46 445 F. Supp. at 1102.

47 Id. at 1103.

minorities.[48] During this period, the State maintained a racially segregated school system. In 1967, a racially integrated committee of educators was established to study the State's certification procedures.[49] The committee considered, among other things, one document which was critical of the NTE as a performance predictor and another which stated the Educational Testing Service's own view that NTE scores should not be the sole criterion for teacher certification.[50] Neverthe-less, the committee recommended the retention of the State's certifi-cation system, and it also recommended that the State raise the minimum score requirement.[51]

In 1969, the ETS urged the State to validate its cut-off score[52] and in 1975, a three judge court issued a decision which required the State of North Carolina to develop objective proof of a rational relationship between the State's minimum score requirement and its objective of limiting certification to competent teachers.[53] The State of South

---

48 Id.

49 Id.

50 Id.

51 Id.

52 Id.

53 United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975), vacated, 425 F. Supp. 789 (E.D.N.C. 1977).

Carolina responded to these developments with an extensive validation study.[54]

To prepare the study, representatives of all of the State's teacher training institutions formed a panel which compared the content of the NTE to the curricula at their schools.[55] The panel was subdivided into subject-matter areas (e.g., art, french, etc.). The panel determined that 63% to 98% of the questions were content valid.[56] After the study was completed, the Board adopted the study's recommendation concerning the establishment of separate minimum score requirements by subject matter areas and raising the minimum score levels.[57] An expert testified during the trial that the ETS study design satisfied the standards of the American Psychological Association and the EEOC's Guidelines.[58]

The Court concluded that the State's actions did not reflect an intent to discriminate against minorities. The Court also found what it deemed to be ample evidence to support the content validity of the NTE.[59] In the court's view, "the NTE has been demonstrated to provide a useful

---

54 445 F. Supp. at 1103.

55 Id. at 1112.

56 Id.

57 Id.

58 Id.

59 Id. at 1114-16.

measure of the extent to which the prospective teachers have mastered the content of their teacher training programs".[60] The Court rejected as "irrelevant" evidence intended to show the lack of any correlation between NTE scores and teaching performance.[61]

The problem with the approach to South Carolina's validation study is that it did not compare the skills needed for effective classroom performance to the content of the examination. The Guidelines concerning standardized tests are set forth in the 29 CFR Part 1607. Under the EEOC Guidelines, which were approved by the Supreme Court in Albermarle,[62] validation falls into several categories, the most significant of which are "criteria related validation" and "content" validation. Criteria related validation requires an employer to show that individuals who pass or receive high grades on a standardized test perform their jobs better than others who fail the examination or receive low grades, i.e., empirical evidence that the examination actually predicts job performance. Content validation requires an employer to show that the actual content of an examination is reasonably related to the knowledge and skills required for effective job performance.

South Carolina's study did not follow this approach. Rather, it more closely resembles "instructional" validation, a concept which was

---

60 Id. at 1108.

61 Id.

62 Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

developed in Debra P. v. Turlington,[63] a case which challenged student competency testing as a pre-condition to graduation. In Turlington, when the test was administered by the State of Florida, 78 percent of the black students failed while only 25 percent of the white students failed.[64] The test was later challenged on due process and equal protection grounds.[65] At the conclusion of the trial, the district court held that the test was not biased.[66] The Court of Appeals reversed after it held that the State was required to prove "instructional validity", that is, that the test covered information which was actually taught in the classroom.[67]

Because of the difficulty involved in establishing what was taught to each student in each school district, the district court ultimately adopted a different approach and upheld the examination after it was remanded on the more limited basis of "curricular validity".[68] Under

---

63 474 F. Supp. 244 (M.D. Fla. 1979), aff'd in part and remanded in part, 644 F. 2d. 397, on remand, 564 F. Supp. 177 (M.D. Fla. 1983), aff'd, 730 F. 2d. 1405 (11th Cir. 1984).

64 474 F. Supp. at 248.

65 Id. at 247.

66 Id. at 261.

67 Debra P. v. Turlington, 644 F. 2d 397, 407-08 (5th Cir. 1988).

68 Debra P. v. Turlington, 564 F. Supp. 177, 186 (M.D. Fla. 1983) (Florida students were "afforded an adequate opportunity to learn the skills tested on the [examination] before it is used as a diploma sanction "Id. at 186).

this approach, as long as the curriculum included certain basic courses, the court would not insist on the strict instructional standard.[69] This modified approach was approved when the case was appealed to the United States Court of Appeals for the 11th Circuit.[70] This approach seems valid in the context of students because it would not be fair to test students for information that was not taught to them. However, it does not apply to the employment context.

Although the Supreme Court summarily approved the panel's decision in United States v. South Carolina,[71] this decision did not apply the business necessity standard which the Court has approved in Title VII cases. Title VII disparate impact cases require employers to use examinations that compare the content of examinations to actual job performance and even if the Davis approach is adopted, the employer would be required to correlate its test to the success of candidates in training programs. Neither of these standards was used in United States v. South

---

69 Id. (the court found that no state would ever be able to prove a test's "instructional validity...as to every student" Id.).

70 Debra P. v. Turlington, 730 F. 2d. 1405, 1412 (11th Cir. 1984) (no expert testified that an instructional validation study "must focus on students who have failed the test" to see if they were in fact taught the tested skills. Id. at 1412).

71 434 U.S. 1026 (1978). Justices White and Frankfurter joined in a dissent because they questioned the legality of the holding that "the NTE need not be validated against job performance." Id. at 1028.

Carolina. If either standard had been applied, the plaintiff would have prevailed in its Title VII claim.[72]

United States v. LULAC

In another case which considered competency examinations, United States v. LULAC,[73] the United States Court of Appeals for the Fifth Circuit reversed a district court decision which enjoined the use of a student competency examination that was developed by the State of Texas. To teach in Texas public schools, a teacher must obtain a certificate from the State Board of Education.[74] To become certified, students must secure an undergraduate minor or major in education and they must also pass the PPST examination.[75] In 1981, the Texas legislature adopted a law which directed the State Board of Education to require satisfactory performance on an examination of basic skills as a condition of admission

---

72 Another approach has been developed in the context of consent decrees which have been entered pursuant to settlements. The "item bias" approach was derived from a consent decree which was entered in an Illinois State Court case which challenged the State's insurance examination. This approach requires the testing service to use questions on which blacks as a group tend to perform as well as whites before it used items on which the performance differential is greater. A more detailed discussion of this approach differential can be found in Rebell, Disparate Impact of Teacher Competency Testing on Minorities: Don't Blame the Test Takers or The Tests, 4 Yale Law and Policy Review 375 (1986).

73 793 F. 2d. 636 (5th Cir. 1986).

74 TEX. EDUC. CODE ANN. § 13.202 (Vernon 1972) (defining "teacher" as any "professional employee who is required to hold a valid certificate or teaching permit" Id.).

75 TEX. EDUC. CODE ANN. § 13.032 (Vernon 1972 & Supp. 1989).

into any approved teacher education program.[76] The Board decided to use the PPST, which was developed by the ETS to test basic skills at the twelfth grade level.[77]

The Board contracted with 10X Associates, a consulting firm, to validate the PPST.[78] 10X's validation study concluded that students in the Texas school system were taught most or almost all of the information needed to answer the questions on the PPST.[79] The study also determined (based on a survey of Texas educators) that the examination covered information relevant to successful performance as a teacher.[80] In the suit, the intervenors[81] claimed that the test violated a 1971 school desegregation consent decree, denied college students their constitutional right to equal protection, denied students their statutory rights under Title VI and the Equal Educational Opportunity Act and rights established by a contract between the United States and the State of

---

76 United States v. LULAC, 793 F. 2d. 636, 639 (5th Cir. 1986).

77 Id. at 640.

78 Id.

79 Id. This conclusion was based on answers to a survey issued to 624 Texas educators, 95% of whom reported that Texas students "were taught 'most or almost all' the information needed to answer all of the questions on the test." Id.

80 Id.

81 The United States was the original plaintiff in the 1971 school desegregation case but by the time of this action, it had decided to join the State of Texas in defending the examination.

Texas called the Texas Higher Education Plan.[82] During the hearing on the preliminary injunction, the intervenors offered expert testimony which indicated that the test was biased against minorities and was not a valid measure of success in education courses or classroom teaching.[83] Other evidence indicated that prior to the Board's adoption of the PPST, it learned from experimental testing that the PPST would have a disparate impact on minority students.[84] The evidence also showed that in the three years that the test was administered, three times as many Blacks and more than twice as many Hispanics failed the test than whites.[85]

At the conclusion of the hearing, the District Court held that discriminatory intent infected the Board's decision to adopt the PPST requirement.[86] The Court's decision was based on evidence which indicated that the defendants knew that the examination would have a disproportionate impact on minority students and failed to offer remedial courses or take any other actions to reduce the adverse impact. The court also found support for its conclusion in the Board's decision to

---

82 Id. at 641.

83 Id. at 640.

84 Id. at 641.

85 Id. at 640.

86 Id. at 641.

adopt an alternate procedure to meet the State's immediate need for teachers while retaining the PPST requirement.[87]

After the injunction was appealed, the Court of Appeals held that the evidence did not justify the district court's injunction based on its determination that the "ultimate impact of the PPST on the number of minority teachers in the state has not been fully assessed."[88] The Court of Appeals also held that in "light of the substantial evidence in the record showing that the test was valid,"[89] the district court's finding that the State's actions violated the 1971 consent decree was clearly erroneous.[90]

Turning to the Title VI claims, the court acknowledged that Title VII's disparate impact analysis applies to claims asserted under Title VI.[91] Nevertheless, without elaborating, the Court of Appeals simply

---

87 Id.

88 Id. at 642.

89 Id. at 643.

90 The consent decree prohibited practices which would discriminate against minority students.

91 In Castaneda by Castaneda v. Pickard, 781 F. 2d. 456 (1986), the Court of Appeals for the Fifth Circuit held, based on the Supreme Court's decision in Guardians Association v. Civil Service Commission of New York, that "actions under Title VI could be maintained in the guise of a disparate impact case,...In this latter type of case, proof of discriminatory intent is not necessary." (In Guardians, the Supreme Court held that a showing of discriminatory intent is not needed to establish a violation of Title VI since regulations implementing Title VI adopted a disparate impact standard.)

concluded that "[s]ufficient evidence has been presented by the State indicating that the PPST test is a valid measure of a bona fide occupational qualification to warrant its assessment in the district court's determination of whether to issue an injunction".[92] This finding is not supported by the clearly erroneous standard and, more important, the validation study did not correlate the PPST to success in undergraduate training programs or successful classroom teaching.

In Anderson v. City of Bessemer,[93] the Supreme Court made it clear that Rule 52 applies to Title VII.[94] As a consequence, "[f]indings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of a trial court to judge the credibility of the witnesses".[95] The court also held that "where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."[96] Finally, the court reaffirmed that an appellate court must defer to the trial court's decision and it cannot reverse "simply because it is convinced that it would have decided the case differently."[97] Thus, if there is evidence to support the trial

---

92 Id. at 649.

93 470 U.S. 564 (1985).

94 FED. R. CIV. P. 52.

95 Anderson, 470 U.S. at 528 (quoting FED. R. CIV. P. 52).

96 Id. at 574.

97 Id. at 573.

court's fact findings, its decision must be sustained on appeal even if the Court of Appeals believes, as the Court did here, that more weight should have been accorded to the evidence presented by the losing party.[98]

Moreover, although a plaintiff is required to prove discriminatory intent to sustain a constitutional violation under Washington v. Davis,[99] intent may be inferred from: the historical background of the dispute; the sequence of events leading up to the challenged decision; the legislative history of the statute; and testimony by officials.[100] In this case, the district court applied this standard and inferred discrimina-tory intent from the State's knowledge of the disparate impact of the PPST on minorities and its failure to take any remedial actions.[101] The Court of Appeals reversed based on its belief that the district court failed to consider adequately and evaluate all of the evidence bearing on the relationship between the examination requirement and the State's educational interests.[102] This approach does not reflect

---

98 Id. at 574 (appellate court may not reverse a trial court "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently").

99 426 U.S. 229 (1976).

100 Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-68 (1977).

101 793 F. 2d. at 641.

102 Id. at 643 (holding the District Court "erred by failing to assess the impact of this evidence" Id.).

a principled application of the clearly erroneous standard. Sufficient evidence was presented to support the district court's inference.

Moreover, since Title VI allows a disparate impact analysis, there was no need to find discriminatory intent. In this case, the PPST was not validated in accordance with the EEOC's Guidelines, which require a challenged practice to "bear a demonstrable relationship to successful performance of the jobs for which it is used".[103] Even if the Davis standard were applied, the validation study would be found deficient because a statistically significant relationship between test scores and successful performance in teacher training programs was not established by the validation study of the PPST.

In the LULAC litigation, the validation study questioned a group of Texas educators who indicated in their responses to questionnaires that the examination questions sought information relevant to teacher training courses and teaching performance.[104] As the Court of Appeals explained, the validation study determined "whether students in Texas college preparatory programs were ordinarily taught what the test required them to know, and whether teachers would need to know the tested materials in order to perform successfully in teacher education courses and as teachers".[105] However, unlike Davis, there was no evidence in LULAC of a

---

103 Griggs v. Duke Power Company, 401 U.S. at 431.

104 Id. at 640.

105 Id.

statistical "correlation between scores on [the test]... and success in the training programs".[106]

Furthermore, to the extent the Texas validation study sought to establish a correlation between the examination and teaching performance, it did not satisfy the applicable standard because the PPST only tested knowledge of various subjects. There is no indication that the State prepared a job analysis which determined the skills and functions that are critical to teaching performance and correlated the examination to those functions. This sort of analysis is required by the EEOC's Guidelines[107] and it seems unlikely that knowledge of the subject matter is the only critical element to effective teaching performance at the primary and secondary levels. As a consequence, the Texas validation study did not satisfy the legal standards of Davis or Albermarle. Thus, regardless of whether the PPST should correlate to success in teacher training programs or classroom performance, the Texas study fails under either standard. Since the State did not establish a "business necessity" defense, the Court of Appeals should have held that the State's use of the PPST violated Title VI.

Conclusion

On October 28, 1988, The New York Times reported that the Educational Testing Service has decided to replace the NTE with a more sophis-

---

106 Davis, 426 U.S. at 251.

107 See, 29 CFR § 1607, which states the technical standards for validation studies.

ticated battery of tests.[108] According to the Times, the new examination will include a test of general knowledge which will be administered to students at the undergraduate level. The new test will also include an examination of teaching skills, making use of interactive video, computer simulations and other new testing techniques and classroom observation after a candidate begins full-time teaching. Although it is not possible to evaluate ETS' proposal without more detailed information, it appears to be "a step in the right direction."[109]

The current examination, which consists of a single multiple-choice examination of general knowledge and knowledge about teaching, is not correlated to important elements of work behavior and it does not predict success in training programs. In fact, the ETS itself has advised against the use of the examination as the sole criterion for teacher certification.[110] It appears that the new examination will address the crucial components which were left out, i.e., the skills that are needed for successful classroom performance. This seems to be consistent with the requirements of the EEOC's Guidelines, which require employers to

---

108 N.Y. Times, October 28, 1988 at 1, 11, col. 5.

109 Id. at 11, col. 5 quoting Mary Flatwood Futrell, president of the National Education Association. Nevertheless, the president of the testing service, Gregory R. Anig, cautioned that "no test will...change the fact that there are unequal educational opportunities in this country." Id.

110 See e.g., York v. Alabama State Board of Education, 581 F. Supp. 779 (M.D. Ala. 1983) (the district court took judicial notice that the ETS guidelines stated that "[u]sing arbitrary cutoff scores on the NTE for any purpose is discouraged. It is unreasonable to choose a qualifying score on the basis of unvalidated criteria..." Id.).

identify the skills critical to the job in question and to correlate the examination to those skills. It would be advisable for the states which require competency examinations to follow ETS' lead. The current approach, which has been limited to testing knowledge of subject areas, does not satisfy the job-relatedness standard of Griggs or the training success standard of Davis.